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NO. 81_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

CARL EDWIN WIGGINS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

WHERE A DEFENDANT INVOKES HIS *FARETTA V. CALIFORNIA* RIGHT OF SELF REPRESENTATION, DOES THE LIMITED PARTICIPATION OF STANDBY COUNSEL ABROGATE HIS EXERCISE OF THE RIGHT, ENTITLING HIM TO FEDERAL HABEAS CORPUS RELIEF?

HAS THE FIFTH CIRCUIT EXTENDED *FARETTA V. CALIFORNIA* BY PRESUMING PREJUDICE WHERE STANDBY COUNSEL ASSISTS A *PRO SE* DEFENDANT, EVEN THOUGH THE DEFENDANT HAD A GENUINE OPPORTUNITY TO REPRESENT HIMSELF?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit, entered in this case on July 26, 1982, rehearing *en banc* denied on November 8, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 581 F.2d 266, *reh. denied*, 591 F.2d 213 (5th Cir. 1982). (Appendices A and B). The report and recommendation of the United States Magistrate, adopted by the district court, appears as Appendix C.

JURISDICTION

The judgement of the United States Court of Appeals for the Fifth Circuit was entered on July 26, 1982. A timely filed petition for rehearing *en banc* was denied on November 8, 1982. This petition for certiorari is filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, art. VI, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . and to have the Assistance of Counsel for his defense.

United States Constitution, art. XIV, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Petitioner has custody of Respondent pursuant to a judgement and sentence of the 187th Judicial District Court of Bexar County, Texas. In January, 1973, Respondent originally was tried and found guilty of the offense of robbery, and his punishment was assessed at

life imprisonment. On March 21, 1973, however, this conviction was set aside and new trial was ordered due to a defective indictment. Respondent was reindicted for the robbery and trial in this cause began on June 4, 1973. At trial, Respondent asserted his desire to waive the assistance of counsel and to conduct his own defense. The trial court granted him the right to do so, but kept two appointed attorneys as standby counsel. On June 8, 1973, Respondent was found guilty of the offense. Punishment again was assessed at life imprisonment.

Respondent appealed to the Texas Court of Criminal Appeals and expressed his desire to waive appellate counsel and represent himself on appeal. Several months later, however, he requested the appointment of counsel. Although counsel was then appointed and timely filed an appellate brief, Respondent also filed a one hundred fifty page appellate brief. The Texas Court of Criminal Appeals affirmed the conviction on March 26, 1975, in *Wiggins v. State*, 520 S.W.2d 780 (Tex.Crim.App. 1975).

Respondent then filed in the state courts five applications for habeas corpus relief and hundreds of pages of various pleadings in the state courts. Respondent also has filed several prior applications for federal habeas corpus relief. A petition for writ of certiorari was denied by this Court on November 13, 1978.

In the instant cause Respondent applied to the United States district court again seeking federal habeas corpus relief in *Wiggins v. Estelle*, No. SA-79-CA-128. On August 26, 1980, the district court entered an order adopting the findings and recommendations of the Magistrate and denying habeas corpus relief. The opinion of a panel of the United States Court of Appeals for the Fifth Circuit, reversing the decision of the district court and ordering that habeas relief be granted, was handed down on July 26, 1982; rehearing *en banc* was

denied on November 8, 1982, with five judges dissenting. *Wiggins v. Estelle*, 581 F.2d 266 (5th Cir. 1982), *reh denied* 591 F.2d 213 (5th Cir. 1982).

B. STATEMENT OF THE FACTS

On April 16, 1973, Respondent filed a request for appointed counsel prior to his second trial, specifically stating that he wished to rescind his earlier waiver of counsel. On April 17, 1973, the trial court entered an order appointing counsel. Thereafter, Respondent continued to act in his own behalf. He filed a motion for a transcript of his prior trial, a motion to suppress the identification of the complaining witness, motions for witness fees and subpoenas, requests for a speedy trial and a change of venue, and a writ of habeas corpus. On May 26, 1973, however, he filed an additional request for counsel. On May 31, 1973, the trial court appointed additional counsel, R. Norvell Graham, to assist Respondent. Nevertheless, Respondent continued to act in his own behalf, filing a motion for special relief, a motion in limine, a bill of exceptions and another special plea, and a motion for a jury shuffle.

Pre-trial hearings began on June 4, 1973. Respondent, against the advice of one of the attorneys, announced ready for trial. Conflict arose between Respondent and the attorneys on this matter, and the trial court stated for the record that Respondent was exercising his right to represent himself and that the attorneys were appointed as standby counsel to consult with him when he so desired or when the trial court directed him to do so. Thereafter, the court began consideration of Respondent's *pro se* motions. During a lengthy discussion concerning discovery, counsel voiced a few requests for particular discovery, and argued in support of them, to which action Respondent made no objection. At one point, Respondent halted the discussion and asserted his desire to proceed *pro se*. He was instructed that he

might be required to consult with counsel on occasion. Additional motions were then presented by Respondent, and he personally conducted the examination of a witness concerning one of the motions. Four times during the examination Graham assisted Respondent; no objection was made at any time to Graham's actions, and, at least once, Respondent specifically *approved* counsel's actions. Thereafter, Respondent argued additional motions.

Pre-trial hearings continued on the morning of June 5, 1973. The trial court refused to dismiss the standby attorneys and refused to enter a specific order restraining the actions of counsel; rather, the court determined to take up individually any problems which arose between Respondent and counsel. Additional *pro se* motions were then made and argued by Respondent.

The first jury panel was instructed that Respondent was exercising his right of self-representation, and that standby counsel was appointed to assist him. At one point in the proceedings, the trial court erroneously informed the panel that Petitioner was being tried as a repeat offender; counsel objected to this, and moved for a mistrial, and Respondent specifically agreed. The panel subsequently was quashed. The second panel was instructed as to Respondent's election to represent himself, and Respondent made his opening statement to the panel. Thereafter, Respondent conducted the *voir dire* examination for the defense *entirely* without assistance or interference from counsel. Thereafter, the jury was sworn and testimony began. Thus, the jury which tried Respondent was examined and selected by Respondent alone.

During all trial proceedings, Respondent examined and cross-examined witnesses, made objections to evidence and arguments, chose which defensive theories and witnesses he would present before the court, and argued his case to the jury at both states of the bifur-

cated trial. During portions of the trial, Respondent *accepted* the assistance and aid of his standby counsel; during other portions he totally rejected any action taken on his behalf. While Respondent now complains of the actions of standby counsel, he more often than not approved of counsel's actions at trial. At various times during the trial, where counsel assisted in making objections or arguments, this actions provoked no complaint or objection by Respondent. Moreover, on various occasions, Respondent specifically *adopted* counsel's objections. During other portions of the trial, *both* Respondent and counsel made objections and argued the same matters, cross-examined the witnesses, and argued to the jury.

Several times during the trial, a conflict arose between Respondent and standby counsel as to matters involving trial strategy. Each time, the trial court recognized Respondent's right to make the necessary decisions as to the conduct of the trial, and *sustained Petitioner's position.* At various other times, when counsel indicated that he wanted to interject matters into the proceedings, the trial court specifically inquired as to whether counsel had Petitioner's permission to do so.

REASONS FOR GRANTING THE WRIT

I.
THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been,but should be, settled by this Court. The issue presented by this case is one of first impression, apparently in any jurisdiction, and concerns the question of whether a criminal defendant's rights under *Faretta v. California*, 422 U.S. 806 (1975) are violated when standby counsel intermittently offers his assistance during the trial. The court below held that such assistance

wholly abrogated the defendant's exercise of his right of self-representation and that federal habeas corpus relief was mandated by the Sixth Amendment. As was stated by the judges dissenting to the denial of rehearing *en banc*, the rule that standby counsel is "to be seen and not heard" and the presumption of prejudice established where standby counsel offers assistance, "defies the rough-and-tumble realities of a fast-moving criminal trial and places judges in an impractical, inflexible strait-jacket." Since this decision represents an unwarranted extension of the principle established by this Court in *Faretta*, this Court should grant the writ to review the lower court's decision.

II.
WHERE A DEFENDANT INVOKES HIS *FARETTA V. CALIFORNIA* RIGHT OF SELF-REPRESENTATION, THE LIMITED PARTICIPATION OF STANDBY COUNSEL DOES NOT ABROGATE HIS EXERCISE OF THE RIGHT ENTITLING HIM TO FEDERAL HABEAS CORPUS RELIEF

This case presents questions of first impression, previously addressed neither in the Fifth Circuit nor, apparently, in any other. In *Faretta v. California*, 422 U.S. 806, (1975), this Court recognized the constitutional right of an accused to dispense with the assistance of counsel and conduct his own defense, since the right to defend is personal and since the accused ultimately must bear the consequences of a conviction. The Respondent in the instant case, tried in 1973, requested and received his right of self-representation. Standby counsel, however, participated to a limited extent, sometimes at Respondent's request, sometimes with his acquiescence and sometimes objectionably to him. The record as a whole reflects, however, that Respondent acted in the capacity of his own counsel, controlling, managing and presenting his defense before the jury. Most discussions as to strategy between Respon-

dent and his standby counsel occurred out of the jury's presence. Each time there was any conflict between Respondent and standby counsel, the trial court recognized Respondent's right to make the necessary decisions as to the conduct of the trial, and sustained Respondent's position.

Thus, the record as a whole conclusively demonstrates that Respondent acted as his own counsel and actually controlled the conduct of the proceedings at trial. His personal decisions in proceeding to trial, examining and selecting the jury panel, making an opening statement, cross-examining the State's witnesses, selecting his defensive theory and deciding which witnesses to present, examining his own witnesses, making objections to evidence and arguing points of law to the court, and arguing his case to the jury, clearly show that he managed and controlled his own defense within the meaning of *Faretta*.

The essence of the right protected in *Faretta* is the control over tactical decisions and defensive strategy, and the opportunity to participate personally in the trial of the case before the finders of facts. This Respondent clearly did. The record supports findings that Respondent, in exercising virtually exclusive management over the trial on the merits, was allowed the right to represent himself.

Nevertheless, the panel opinion held:

> . . . the rule that we establish today is that court-appointed standby counsel is "to be seen, but not heard"

681 F.2d at 273, and found that the limited participation of counsel completely abrogated Respondent's exercise of his right of self-representation.

First, the standard of review should be not whether standby counsel interjected himself into the trial proceedings in any way, but rather should focus on whether the *pro se* defendant was afforded a *genuine opportunity* to conduct his defense. Petitioner urges that *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977) sets out the appropriate standard of review; *i.e.*, whether a *pro se* defendant has been afforded a *genuine opportunity* to conduct his defense. While the lower court's opinion noted this language in *Chapman*, nowhere did it discuss whether Respondent had such a "genuine opportunity," or the applicability of this suggested standard of review. The test adopted in that opinion, that *any* interjection of standby counsel constitutes federal constitutional error, should be rejected.[1]

In addition, the test adopted by the lower court establishes a rule which would totally bind the hands of a trial judge confronted with a defendant exercising his *Faretta* right. Under this test, standby counsel would be absolutely prohibited from speaking up in the *pro se* defendant's behalf, no matter what the circumstances, unless the defendant requested him to do so.

This rigid and unbending rule would not serve the interests of justice. In *Cuyler v. Sullivan*, 446 U.S. 335, (1980), this Court iterated that:

> . . . a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment (citations omitted) . . .

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1 . The opinion correctly pointed out that the application of this rigid test could result in defense counsel "sandbagging" the prosecution. 681 F.2d at 274.

446 U.S. at 343. This Court continued, that when the state obtains a criminal conviction through a trial in which procedural and substantive safeguards are denied, it is the state that unconstitutionally deprives the defendant of his liberty, since the "[s]tate's conduct of a criminal trial itself implicates the state in the defendant's conviction." 446 U.S. at 344-45. Thus, the state, too, has a strong interest in obtaining lawful criminal convictions.

To require the trial court and standby counsel to remain mute thoughout the proceedings, no matter what transpires, which is the ultimate result dictated by the lower court's opinion, may be detrimental to the interests of the defendant and the state in ensuring fundamental fairness in criminal proceedings.[2] While the state's interest certainly may not supersede a defendant's interest in exclusive management of his trial, that interest at least should be considered in determining whether a rigid test for constitutional error should be established, or whether the proceedings should be reviewed on a case by case basis.[3]

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2. Moreover, the lower court strongly implied that the trial court should have ordered standby counsel to remain mute, rather than determining to take up problems on an individual basis.

3. *E.g.*: Under the test established by the panel opinion, if standby counsel heard evidence that the *pro se* defendant's confession might have been involuntary and brought that to the attention of the trial court, which then conducted a *Jackson v. Denno*, 378 U.S. 368 (1964) hearing and suppressed the confession, this action of counsel would constitute error of constitutional dimension. Further, pursuant to the standard adopted in the panel opinion, it would constitute *harmful* constitutional error, entitling the defendant to federal habeas relief, since the request was at odds with the defendant's wishes and certainly contravened the interests of the defendant as set out in the lower court's opinion.

Petitioner urges this Court to overrule this rigid test for constitutional error, *i.e.*, whether standby counsel has been heard as well as seen, and to establish a standard of review which inquires into the *pro se* defendant's genuine opportunity to manage, control and conduct his defense at trial.

III.

THE FIFTH CIRCUIT HAS EXTENDED *FARETTA V. CALIFORNIA* BY ESTABLISHING A PRESUMPTION OF PREJUDICE WHERE STANDBY COUNSEL ASSISTS A *PRO SE* DEFENDANT, EVEN THOUGH THE DEFENDANT HAD A GENUINE OPPORTUNITY TO REPRESENT HIMSELF.

The lower court's rigid review of standby counsel's conduct and the presumption of prejudice established are unwarranted. As noted by the opinion:

> [t]he *Chapman* decision did leave room, however, for a finding of harmless error if the defendant was "afforded a genuine opportunity to help conduct his defense." 553 F.2d at 891 n.9.

681 F.2d at 274, n.26. The Court subsequently, however, found that speculation as to actual harm suffered by the Respondent through standby counsel's conduct was unnecessary, as it found that a presumption of prejudice would be applied wherever a standby attorney is 'heard as well as seen.' Petitioner urges that a presumption of prejudice in these situations is unwarranted. *See e.g., United States v. Frady*, ____U.S.____, 102. S.Ct. 1584 (1982).

In addition, the lower court noted that while:

> [i]nterjections made in the presence of the jury are inherently prejudicial, and are therefore subject to strict scrutiny, statements made outside their

> presence are not to be discounted. Conceivably, a defendant could become so frustrated or flustered by standby counsel's interference as to be unable to regain his composure by the time the jury returned.

681 F.2d at 274, n. 27.

There is no basis for assuming that any comment made by standby counsel in the presence of the jury is inherently prejudicial to a defendant's exercise of his right of self-representation. Neither is this presumption mandated by *Faretta;* rather, it represents an unwarranted extension of *Faretta,* and grants to a *pro se* defendant the constitutional right to be free of any utterance by his standby counsel, with a presumption of harm if he is not. Surely this broad construction of *Faretta* was not intended by this Court. Further, the lower court's findings that discussions with or statements by standby counsel out of the presence of the jury "are not to be disregarded" because the defendant may become "frustrated or flustered," effectively tie the hands of both the trial court and counsel, for fear of later claims by a defendant that discussions of law or strategy "upset" him.

In addition, the lower court's opinion appears internally inconsistent, which could result in much confusion to bench and bar. The opinion notes:

> . . . in the interest of justice, the court or standby counsel may wish to draw the defendant's attention to some legal aspect of which he may be painfully unaware. In such instances the court, either on its own or after being asked by standby counsel, may *request* that the accused confer with counsel . . .

681 F.2d at 273, n.24. Yet in its discussion of the presumption of prejudice arising when standby counsel speaks, the lower court found that these discussions "are not to be discounted" in determining prejudice to

the defendant. Thus, if standby counsel, perceiving some grave danger to the defendant's case, requests that the trial court retire the jury so that the matter can be explained to the defendant, standby counsel commits constitutional error. If the jury is removed and the legal matter is brought to the defendant's attention, it is quite conceivable that he later could claim that this diversion frustrated or flustered him, or that the mere act of counsel in requesting that the jury be removed was sufficient to prejudice him before the jury or that it had a "negative impact" upon his self-representation. Thus, how the trial court and standby counsel are to walk this fine line is very unclear indeed, given the lower court's rigid test for constitutional error and its presumption of prejudice. Petitioner urges this Court, instead, to adopt the "genuine opportunity" inquiry as the standard of review and test for prejudice.

In addition, the holding of the panel is inconsistent with other lower court decisions construing *Faretta*. In *Brown v. Wainwright*, 655 F.2d 607 (5th Cir. 1982)(*en banc*), the defendant first invoked his *Faretta* right; however, during the course of trial proceedings, his subsequent conduct and behavior were found to constitute a waiver of his right. The lower court's treatment of Respondent's requests for standby counsel's assistance from time to time and his acquiescence in counsel's assistance on occasions is inconsistent with the notion that a *pro se* defendant may, by his conduct, waive self-representation. While clearly Respondent in the instant case never waived his *Faretta* right entirely, the record reflects that from time to time he sought out counsel's affirmative participation and then acquiesced in his services, which constituted a waiver during those moments of claims of "interference" by standby counsel.

The record reflects that Respondent more often than not approved of counsel's limited assistance at trial. On various occasions, Respondent adopted counsel's objec-

tions. Other times, Respondent acquiesced in counsel's assistance. During some portions of the trial both Respondent and counsel argued, at Respondent's request. If any conflict in trial strategy arose between the two, the trial court, after ascertaining Respondent's wishes, always sustained Repsondent's position. Other times, when counsel indicated that he wished to make some point, the trial court specifically inquired whether counsel had Respondent's permission to do so. Finally, most instances when Respondent and counsel disagreed as to strategy occurred entirely out of the presence of the jury. Each time Respondent's position was sustained by the trial court.

The lower court, however, wholly discounts Respondent's requests for counsel to assist him and his frequent acquiescence in and approval of counsel's participation, in finding that counsel's assistance was harmful constitutional error. Further, the panel fails to point out that Respondent's strategic decisions were always sustained, and the majority of the conflict between the two occurred out of the presence of the jury. Moreover, the panel admittedly engages in speculation regarding harm to Respondent. Finally, the panel states:

> Once the right of self-representation has been asserted there will be no question of acquiescence unless counsel's participation has been *overtly encouraged* by the defendant.

681 F.2d at 275 (emphasis added). The opinion, however, ignores the fact that portions of counsel's assistance *were* overtly encouraged by Respondent. Respondent's conduct in requesting counsel's assistance and adopting his legal theories constitutes a waiver of objection as to that extent of counsel's participation.

Because the record reflects Respondent alone made the decision to proceed to trial, conducted the jury *voir dire*, selected the jurors, examined and cross-examined witnesses, made tactical and strategic decisions, chose and presented his defensive theories, made objections to evidence and argued in support of his position, made objections to the court's charge and submitted requested charges, and argued his case to the jury at both phases of the trial, the lower court's holding that the limited assistance of standby counsel constituted harmful constitutional error entitling Respondent to federal habeas relief, should not stand. This Court should grant certiorari to reject the Fifth Circuit's adoption of a presumption of prejudice where standby counsel in any way assists a *pro se* defendant, who had a genuine opportunity to conduct his own defense in accordance with *Faretta*.

CONCLUSION

For these reason, Petitioner prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX A

Carl Edwin WIGGINS,
Petitioner-Appellant,

v.

W.J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 80-2278.

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1982.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 26, 1982, 5 Cir., 1982, 681 F.2d 266)

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

Before CHARLES CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL,

TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges*.

E. GRADY JOLLY, Circuit Judge, with whom CLARK, Chief Judge, BROWN, GEE And GARWOOD, Circuit Judges, join, dissenting from denial of Suggestion for Rehearing En Banc:

The issue presented by this case is one of first impression and concerns the question of whether a criminal defendant's Sixth Amendment *pro se* rights under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), are violated when court-appointed standby counsel intermittently interrupts the defendant's presentation of his case.

Because I am convinced that the defendant did conduct his own defense and that the occasional interruptions by standby counsel were harmless, and because of the precedential effect of this case and its impact on the conduct of criminal trials in the future, I respectfully dissent from Judge Garza's thoughtful, well-written opinion.

In this opinion the court has stated that the test in assessing violation, *vel non*, of a defendant's right to self-representation is one of "harmless error." Elucidating the applicability of this test, the court has cited *Chapman v. United States*, 553 F.2d 886, 891 (5th Cir. 1977), which stated in dictum that harmless error exists where the defendant is "afforded a genuine oppor-

*Judge Garza, author of the opinion, took senior status just prior to the rendition of the opinion and did not participate in the en banc vote.

tunity to help conduct his defense." *Wiggins v. Estelle*, 681 F.2d 266 at 274 n.26 (5th Cir. 1982).[1]

In making a determination of whether there has been harmless error, "an examination of the record as a whole is necessary; passages are to be examined in context, and evaluated in light of their effect on the total mix." *Id.* at 274.

Viewing the record of this 4-day trial "as a whole," the inescapable conclusion is that not only did Wiggins have a "genuine opportunity to *help* conduct his defense," he did *in fact* conduct his defense. He conducted the voir dire without assistance or interference from counsel, made the opening statement to the jury, examined and cross-examined witnesses, objected to evidence and arguments, and argued his case to the jury at both stages of the bifurcated trial.

When conflict occasionally arose between the defendant and standby counsel, the trial court recognized the defendant's *pro se* rights and sustained his position.

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1. In *Chapman*, the court cited *Juelich v. United States*, 342 F.2d 29 (5th Cir.), as an "appropriate use of the harmless error doctrine." 553 F.2d at 891 n.9. In *Juelich* this court held that denial of the statutory right to *pro se* defense under 28 U.S.C § 1654 was not *per se* grounds for reversal, absent a showing of prejudice:

> A careful reading of the record convinces us that appointed counsel was able, diligent and faithful, and that his participation in the trial certainly did not prejudice Juelich. Indeed, Juelich himself was freely permitted to assign additional grounds for his motion to vacate, to testify at legnth in his own behalf, to ask questions of the witnesses, and to argue his contentions. He thus had the benefit both of his counsel's services and of his own direct participation in the hearing. He was in no way prejudiced by the presence and participation of his counsel.

342 F.2d at 33.

When standby counsel sought to interject something, the trial court inquired specifically as to whether the defendant had given his permission.

On the whole, the defendant and counsel worked well together in full view of the jury. The defendant accepted numerous objections made by standby counsel and participated jointly with him in matters such as cross-examination and arguments to the jury.

In my view, the few incidents of interference which occurred were, examined in context, harmless under the *Chapman* standard. These incidents, which involved the use of profanity by standby counsel, were embarrassing to the trial court and are embarrassing to this court. This impropriety does not alter the fact that the defendant conducted his own trial within the framework laid down in *Farretta*. We should not allow our embarrassment to create bad precedent as a means of apologizing.

The importance of this case arises from the fact that the rule enunciated therein that standby counsel is "to be seen and not heard" creates numerous difficulties for trial court judges in their conduct of criminal trials. This rule defies the rough-and-tumble realities of a fast-moving criminal trial and places judges in an impractical, inflexible strait-jacket. I am concerned that it presents opportunities for ill-motivated defendants (or their attorneys for that matter) to set-up and sandbag the trial court into committing error.[2]

The perfect trial has yet to be conducted. Its impossibility cannot, of course, deter our efforts for its

2. I note, for example, that in this case the defendant pleaded, alternatively, ineffective assistance of counsel. Following the dictates of this case, I would not be surprised to see such either/or appeals become routine practice.

achievement. Nevertheless, we must be aware of the realities with which trial judges grapple, day in and day out. It is my view that the panel lost that awareness, and that the en banc court should review this case before it becomes precedent in this circuit. I therefore dissent from the decision not to grant en banc.

APPENDIX B

Carl Edwin WIGGINS,
Petitioner-Appellant,

v.

W.J. ESTELLE, Jr., Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 80-2278.

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1982.

Appeal from the United States District Court for the Western District of Texas.

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

GARZA, Circuit Judge:

Rarely does a case come before this Court with an issue never previously addressed. This is such a case. While other issues have been raised,[1] the pivotal

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1. On this appeal, appellant has reurged all of the theories for federal habeas corpus relief presented below. Wiggins claims: (1) that he was denied due process because of pre-indictment delay; (2) that he was denied his right to a speedy trial; (3) that he was placed in double jeopardy when he was reprosecuted after his first conviction was set aside; (4) that he was denied his consitutional right to represent himself; (5) that he was denied effective assistance of

issue on this appeal is whether a defendant who is permitted to conduct his own defense may still be denied his constitutional right of self-representation[2] by unwanted interferance in his behalf by court-appointed, standby counsel. We conclude that such a violation can occur, as it did in the instant case, and reverse the district court's denial of the Great Writ.

The circumstances surrounding the crime are easy to relate. In the early evening of January 17, 1972, a man wielding a rusty pistol robbed a Piggly Wiggly store in San Antonio. After having the cashier stuff the day's proceeds into a brown paper bag, the robber fled the store and drove away in his car. Before driving away, however, a second store employee managed to see the thief's license plate number and wrote it down in the palm of his hand. That number was later traced to the appellant, Carl Wiggins.

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counsel; (6) that he was denied the right to obtain defense witnesses; (7) that he was denied an adequate record for appeal; and (8) that he was denied the right to represent himself on appeal.

If meritorious, the first theories would demand that appellant forever be set free. The balance are less final. While the second three theories would require that Wiggins be given a new trial, the latter two would only permit him to re-appeal. A review of the record and applicable law reveals the first set to be spurious. The bulk of the remainder need not be discussed in light of our reversal of the district court's denial of habeas relief.

2. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

After a few false starts,[3] Wiggins was indicted and subsequently brought to trial. Before trial commenced, however, appellant requested that he be permitted to conduct his own defense. The court granted that request, but at the same time appointed two attorneys as standby counsel.[4]

3. Wiggins was originally arrested on February 20, 1972, and an indictment was returned approximately two months later. On May 17, 1972, defendant successfully had that indictment quashed for being fatally defective. Accordingly, he was released. On June 7, 1972, Wiggins was reindicted for the same offense and taken into custody on June 29, 1972. He was tried in January 1973, found guilty, and, because of a charge of enhancement, was sentenced to life imprisonment. Approximately three weeks after sentencing, a hearing was held at defendant's request regarding two motions: a motion to withdraw notice of appeal and a motion for new trial. At that hearing, it was discovered that the second indictment was also fatally defective, and the court granted Wiggins' request for a new trial. Five days later, on March 28, 1973, two new indictments were returned by the grand jury, both alleging the same offense. On June 4, 1973, the State elected one of the indictments to try Wiggins under, and the trial in question commenced.

4. DEFENDANT: Your Honor, I am defending myself and feel that relative to the motions that I filed, that they can be heard without the transcript.

MR. SAMPLES: Your Honor, there has—an issue has been raised as to the representation of Mr. Wiggins. The Court did appoint myself, Benjamin Samples to represent Mr. Wiggins, along with Mr. Norvell Graham who is here, and although I understand there was a previous trial and Mr. Wiggins did at that time represent himself, I don't know whether the determination has been made by this Court as to who is going to represent whom.

THE COURT: Well, Mr. Wiggins has a right to represent himself, and under the law the Court has made available to him for consultation [sic] and/or use, that he would wish to make within the framework of your professional abilities, both you and Mr. Graham who will be available, that he may consult with whoever he wishes to consult.

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The conduct of these attorneys during the course of the trial is the core of appellant's argument that he was denied his Sixth Amendment right of self-representation. While the court made it clear that counsel were present for advisory purposes only,[4] it was not long before one of the attorneys began to take on a more active role. Soon Wiggins began to protest against standby counsel's unsolicted participation, claiming that it prohibited him from conducting his own

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Now, as I understand the law, he has a right to represent himself as long as he does that within the framework of the law and the rules of the proper conduct of the trial.

There may be times when his knowledge and ability is not such that he is doing it properly and it may be that the Court at that time will suggest to him that he consult with counsel, but counsel will be here at the counsel table with him and confer with him as he wishes.

....

Let the record show that the defendant, Mr. Carl Edwin Wiggins, has by his own design, elected to be attorney for himself pro se, but that the Court has appointed previously Mr. Ben Samples and also Mr. R. Norvell Graham, both practicing members of the San Antonio Bar, to assist Mr. Wiggins, to advise Mr. Wiggins if he wishes to be advised, or to consult with them when the Court directs he consult with them, that they are here present in Court and available sitting right behing him.

You may proceed.

Record, vol. I, at 12-14.

4. *id.*

defense.[6] The court's response was that defendant was going to receive counsel's aid whether he wanted it or not.[7] When defendant later requested that the court at least instruct standby counsel not to take the initiative,

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6. MR. GRAHAM: Again, Your Honor, we certainly believe that the arrest of the defendant's son, because of the , because of the—

DEFENDANT: Your Honor, the defendant's son was not arrested.

THE COURT: Wait a minute.

DEFENDANT: Your Honor, I would like to defend myself. I would appreciate it, sir, if you would ask this man to let me defend myself.

MR. GRAHAM: Certainly. Help yourself.

DEFENDANT: I would be grateful. I have not solicted his assistance, Your Honor, and I don't want it.

Id at 39.

7. THE COURT: You are going to get help and/or assistance from him because you are obviously not a lawyer.

DEFENDANT: Yes sir, I am not a lawyer.

THE COURT: And this trial, if we do go into it, is going to be conducted according to the rules of law.

DEFENDANT: Yes sir.

THE COURT: And there might be an occasion when this Court is going to require that you consult with them as to what the proper procedure may be.

DEFENDANT: Yes sir.

THE COURT: You will have every right made available to you under the law, as this Court is able to determine.

DEFENDANT: I appreciate that, Your Honor, but for assistant counsel to initiate something that the defendant does not want, I would like to consult with the attorneys for advice. I will appreciate that, but for counsels to initiate something that is contrary to the defendant's case, well, then, I couldn't appreciate that.

Id at 40-41.

the court refused.[8] Thereafter, counsel continuously participated in the proceedings, both in and outside the presence of the jury. In addition to making objections too numerous to cite, counsel on several occasions curs-

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8. THE COURT: All right. Mr. Wiggins, what is your pleasure. Mr. Graham here was appointed just two days ago as additional counsel. The law provides that when an attorney is appointed to represent someone, he shall have ten days time in which to prepare. You have had one attorney, though, that has been available to you and has had a month and a half to prepare, but you wish to proceed at this time?

DEFENDANT: Yes, Your Honor, I do.

THE COURT: You are waiving the ten days as far as Mr. Graham is concerned?

DEFENDANT: Yes, Your Honor.

THE COURT: The basis of that is that you expect to be an attorney for yourself pro se?

DEFENDANT: Yes, Your Honor. In fact, not only that, I would like to waive his assistant, if I may.

THE COURT: The Court is not going to relieve you of that. Now, you can use it or not use it. It's available to you in this case.

DEFENDANT: Yes sir, I would ask the Court to ask Mr. Graham not to take the initiative to interfere with the defendant here, if I may do that?

THE COURT: Well—

DEFENDANT: I mean, if I want Mr. Graham's help I will ask for it and appreciate it if he wouldn't volunteer without me asking for it.

THE COURT: Well, Mr. Graham is a competent attorney and he has much experience in this type of thing and I am sure what he is trying to do is what he thinks is best for you. I am not going to order him to do or not to do anything. If some problem or situation arises, I will act on it at that time. I am not going to order him not to.

DEFENDANT: Your Honor, do I understand that the Court is forcing the services of Mr. Graham on the defendant?

THE COURT: His availability, yes.

DEFENDANT: May I except to that, Your Honor?

THE COURT: It's in the record.

Id. at 65-67.

ed,[9] argued with defendant,[10] and moved for mistrial against the defendant's wishes.[11] By the time the smoke cleared, Wiggins had been convicted and sentenced to life imprisonment as a recidivist.

Little time was lost before Wiggins began running the gauntlet of direct appeal,[12] petitions for state writ of

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9. One example of this occurred when Wiggins was examining a witness during voir dire:

DEFENDANT: I want to ask him this question here on this statement that's dated February 15. May I show it to you?
MR. GRAHAM: God damn it. Wait a minute. I am trying to get...
(Thereupon, Mr. Graham conferring with defendant.)
Id. at 215. *See also* Record, vol. II, at 422.

10. The following is representative:

DEFENDANT: Your Honor, I have some questions relative to the in-Court—
MR. GRAHAM: We will take him on cross-examination.
DEFENDANT: I would like to ask him. They are very relevant.
MR. GRAHAM: You can get him on cross-examination. Sit down.
Record, vol. I, at 223.

11. MR. GRAHAM: Notwithstanding the Court's instruction, I am sure it is so prejudicial as to require a mistrial.
DEFENDANT: No, Your Honor. I object to a mistrial. I object to counsel—
THE COURT: I denied the motion for mistrial. Overruled.
MR. GRAHAM: Jesus Christ.
Record, vol. II, at 422. *See also* Record, vol. II, at 345-46, 498-99, 512-14 and 539-40.

12. *Wiggins v. State*, 520 S.W.2d 780 (Tex.Cr.App.1975).

habeas corpus,[13] and a petition to the Supreme Court for writ of certiorari. When these routes proved unfruitful, Wiggins undauntedly applied for federal habeas corpus relief.[14] The district court disposed of the petition by adopting the recommendations of the federal magistrate to whom it had been referred. This appeal followed.

Fool for a Client?[15]

A

The leading case on the right to self-representation is *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In that case, the accused clearly and unequivocally let it be known prior to trial that he wished to represent himself and did not want the aid of counsel. Yet despite a knowing and intelligent waiver, the state court compelled the accused to accept the services of a court-appointed public defender. The Supreme Court held, in a six to three decision, that under these circumstances, the defendant had been

13. Wiggins filed five petitions for state habeas corpus relief and hundreds of pages of various pleadings in the state courts. His first two applications were filed while his direct appeal was pending. The next two applications were denied by the Texas Court of Criminal Appeals on October 15, 1975, and may 3, 1978. On January 10, 1979, appellant's fifth application was denied; he was also found to have abused the writ.

14. Six separate points of error connected with his trial and conviction were alleged, together with two points of error connected with his appeal from that conviction. *see* note 1 *supra*.

15. "If there is any truth to the old proverb that '[o]ne who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a *constitutional* right on one to make a fool of himself." *Faretta v. California*, 422 U.S. 806, 852, 95 S.Ct. 2525, 2549, 45 L.Ed.2d 562, 592 (1975)(Blackmun, J., dissenting).

denied his constitutional right to conduct his own offense.

In the case before us the defendant also chose, for whatever reason,[16] to proceed *pro se*. Unlike the *Faretta*

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16. Numerous theories have been advanced for why a defendant might choose to represent himself.

> Defendant's refusal of the right to the assistance of counsel may be grounded on the defendant's belief that, with counsel, the defendant will be denied any opportunity to speak for himself or herself and that only through personal presentation of the case can the merits of the case really be made known. Further, a defendant may believe that no lawyer will faithfully represent the defendant at a fair fee, or that the judicial system is so inherently unjust that the only chance for a fair trial is for the defendant to represent himself or herself. Other motives may include the hope that the absence of counsel may afford a basis for reversal of a conviction regarded as inevitable, or the desire to ventilate hostility through the dramatic vehicle of a disorderly trial.

ABA Standards of Criminal Justice, The Trial Judge's Function, Standard 6-3.6(a)(2nd ed. 1980). *See generally Comment, The Right to Defend Pro Se in Criminal Proceedings*, 1973 Wash.U.L.Q. 679, 679-80 n.3 (1973); and Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 Duq.L.Rev. 245 (1964).

By far, the most frequently cited theory for why a defendant will elect to proceed *pro se* is that of trial strategy. He may view self-representation as a means of invoking the jury's sympathy by projecting the image of the lone defendant against the mammoth State. Participation by court-appointed counsel would sour that image in the minds of the jurors. A defendant may also want the opportunity to have the jury judge him as a person, and hopefully decide all matters of credibility in his favor. As part of that plan, he may choose to take a very low key approach to trial, thereby conveying the impression that he has nothing to hide. In this situation, counsel's intrusion may force disagreements and confusion which would undermine the picture the accused wishes to present.

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case, however, the right was granted. Nevertheless, court-appointed standby counsel were appointed over Wiggins' objections.[17] As already shown, one of these

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> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 2540, 45 L.Ed.2d 562, 581 (1975).

17. *See* notes 4 an 8 *supra*.

That a trial court may appoint standby counsel even over the objections of an unwilling defendant is without question. This was expressly recognized in *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 2541 n.46, 45 L.Ed.2d 562, 581 n.46 (1975).

The presence of standby counsel allows a trial judge to retain an impartial role since the defendant may instead turn to his court-appointed attorney for assistance when troubled by legal matters. Should the *pro se* defendant lose his self-representation right—for example, by obstructionist misconduct—standby counsel can step in and the trial can continue uninterrupted, thereby conserving judicial resources. The same may be said for the situation where defendant chooses to abandon the right.

attorneys did far more than merely "standby." The narrow issue presented on this appeal, then, is whether a defendant's Sixth Amendment right to self-representation may be violated by the unsolicited participation of overzealous, court-appointed standby counsel.[18] it is an issue not presented in *Faretta*, but one clearly raised by it.

Since *Faretta*, the Supreme Court has shed little light on how many of the procedural difficulties resulting from that decision[19] should be resolved.[20] Nor has there been

18. This decision pertains only to those situations in which a defendant has elected to proceed *pro se*, but the court, in its discretion, has appointed standby counsel. What is not currently before us is the situation where, under State law, a defendant may elect to go to trial and conduct his own defense *together* with counsel. *See Faretta v. California*, 422 U.S. 806, 813 n.10, 95 S.Ct. 2525, 2530 n.10, 45 L.Ed.2d 562, 569 n.10 (1975).

19. In the conclusion to his dissent, Justice Blackmun ominously warned that

> Although the Court indicates that a pro se defendant necessarily waives any claim he might otherwise make of ineffective assistance of counsel, ante, at 835 n.46, 45 L.Ed.2d 581, the opinion leaves open a host of other procedural questions. Must every defendant be advised of his right to proceed pro se? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se? Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the pro se defendant differently than it would professional counsel? I assume that many of these questions will be anwered with finality in due course. Many of them, however, such as the standards of waiver and the treatment of the pro se

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a case, Supreme Court or otherwise, in which a court has been squarely presented with the question of defining the role of standby counsel.[12] However, notwithstanding the paucity of authority on the subject, *Faretta* itself offers some guidelines.

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> defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation. The procedural problems spawned by an absolute right to self-representation will far outweigh whatever tactical advantage the defendant may feel he has gained by electing to represent himself.

Faretta v. California, 422 U.S. 806, 852, 95 S.Ct. 2525, 2549, 45 L.Ed.2d 562, 591-92 (1975).

20. In the seven years since its release, the Supreme Court has referred to *Faretta* only ten times, mostly in a cursory fashion. *Edwards v. Arizona*, 451 U.S. 477, 482, 489, 101 S.Ct. 1880, 1883, 1887, 68 L.Ed.2d 378, 384, 389 (1981); *Lenhard v. Wolff*, 444 U.S. 807, 808, 100 S.Ct. 29, 62 L.Ed.2d 20 (1979); *Gannett Co., Inc. v. De Pasquale*, 443 U.S. 368, 380, 417, 99 S.Ct. 2898, 2905, 61 L.Ed.2d 608, 621 (1979); *United States v. Grayson*, 438 U.S. 41, 56, 98 S.Ct. 2610, 2618, 57 L.Ed.2d 582, 593 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 382, 97 S.Ct. 2691, 2708, 53 L.Ed.2d 810, 834 (1977); *Brewer v. Williams*, 430 U.S. 387, 419, 97 S.Ct. 1232, 1249, 51 L.Ed.2d 424, 449 (1977); *North v. Russell*, 427 U.S. 328, 343, 96 S.Ct. 2709, 2716, 49 L.Ed.2d 534, 544 (1976); *Estelle v. Williams*, 425 U.S. 501, 522, 96 S.Ct. 1691, 1701, 48 L.Ed.2d 126, 141 (1976); *Michigan v. Mosley*, 423 U.S. 96, 109, 96 S.Ct. 321, 329, 46 L.Ed.2d 313, 324 (1975); and *Herring v. New York*, 422 U.S. 853, 864, 866, 95 S.Ct. 2550, 2557, 45 L.Ed.2d 593, 602 (1975).

21. A pre-*Faretta* case has stated in dicta, however, that "[a]lthough it is not error for the court to require counsel to be present and prepared to give advice, such counsel may not interfere with the defendant's presentation of the case and may give advice only upon request." *United States v. Price*, 474 F.2d 1223, 1227 (9th Cir. 1973). *See also United States v. Pomeroy*, 485 F.2d 272, 275 (9th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S.Ct. 1571, 39 L.Ed.2d 877 (1974).

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The essence of *Faretta* was succinctly stated:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the

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A more active role for the attorney appears to be suggested by Standard 6-3.7 of the ABA Standards of Criminal Justice, The Trial Judge's Function (2nd ed. 1980):

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

The Comments section to that standard, however, states that "the court should ordinarily appoint standby counsel to *assist the accused if and when called upon...*" (emphasis added).

See also Uniform Rules of Criminal Procedure 711, in which it was stated that

> Notwithstanding acceptance of a waiver the court may appoint standby counsel to assist when called upon by the defendant, to call the court's attention to matters favorable to the defendant upon which the court should rule upon its own motion, and, should it become necessary for a fair trial, to conduct the defense.

The Comments section further stated that:

> As long as the standby counsel only assists when called upon by the defendant and calls the court's attention to matters favorable to the defendant upon which the court should rule upon its own motion, as provided by the ABA Standard, there is not interference with the defendant's representing himself.

> right to make his defense... The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant.... To trust counsel upon the accused, against his considered wish, thus violates the logis of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists .... An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Faretta v. California, 422 U.S. 820-21, 95 S.Ct. 2533-34.

Court-appointed counsel was never meant to be an albatross tied around a defendant's neck. Instead, he was intended to be a means through which a defendant, ignorant of the intricate mechanics of the law, could effectively present his defense. *See Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932). But like any other tool, he may be used or not used. Here, Wiggins chose to conduct his own defense; this much was constitutionally guaranteed under *Faretta*. He also wished to dispose of the court-appointed standby counsel, but the trial court refused. Under *Faretta*, this matter was within the court's

discretion.[22] But while the presence of standby counsel may be forced on a defendant, his aid may not. His function is "to aid the accused *if and when the accused requests help....*" *Faretta v. California*, 422 U.S. at 835 n.46, 95 S.Ct. at 2541. Anything more would prevent the *pro se* defendant from conducting *his* defense. Therefore, the rule that we establish today is that court-appointed standby counsel is "to be seen and not heard." By this we mean that he is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only,[23] to be used or not used as the defendant sees fit.[24]

B

The more difficult question on this appeal was posed by Justice Blackmun in his dissent to *Faretta:* "May a violation of the right to self-representation ever be harmless error?"[25] Perhaps the best authority for the

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22. *Farretta v. California*, 422 U.S. 806, 835 n.46, 95 S.Ct. 2525, 2541 n.46, 45 L.Ed.2d 562, 581 n.46 (1975). *See also Mayberry v. Pennsylvania*, 400 U.S. 455, 466, 91 S.Ct. 499, 505, 27 L.Ed.2d 532, 540 (1971)(Burger, C.J., concurring).

23. His role, of course, will broaden should defendant lose his right to conduct his own defense, either through abandonment or forfeiture. *See* note 17 *supra*.

24. While not before us, we are conscious of the fact that in the interests of justice, the court of standby counsel may wish to draw the defendant's attention to some legal aspect of which he may be painfully unaware. In such instances the court, either on itw own or after being asked by standby counsel, may *request* that the accused confer with counsel, but the defendant may elect not to do so.

25. *Faretta v. California*, 422 U.S. 806, 852, 95 S.Ct. 2525, 2549, 45 L.Ed.2d 562, 592 (1975). For other procedural questions left open by *Faretta*, see note 19 *supra*.

proposition that a denial of the right to conduct one's own defense will always be reversible error is *Faretta* itself. Nowhere in the case is there any indication that the defendant was prejudiced by the rejection of his *pro se* request, that his state-appointed attorney did not conduct an able defense, or that there were any statutory or constitutional grounds for reversal other than the trial court's denial of Faretta's right of self-representation. The case is clearly one in which an otherwise "harmless" denial of a constitutional right is itself sufficient grounds for reversal.[26]

Not every violation of a constitutional right, however, requires an automatic reversal of a conviction regardless of the facts and circumstances. As the Supreme Court stated in *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969): "although 'there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error;, not all 'trial errors which violate the Constitution automatically call for reversal.'" 395 U.S. at 251, 89 s.Ct. at 1727 (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, 710 (1967)). *Faretta* is distinguishable. There the defendant's right to proceed *pro se* had been completely denied. Wiggins, on the other hand, had been granted that right. It had, however, been interfered with. Under these limited cir-

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26. In *Chapman v. United States*, 553 F.2d 886, 891-92 (5th cir. 1977), this Court held that the denial of the right to self-representation can never be considered harmless in the sense that an error that has no effect on the outcome of the case is considered harmless. *See also Scott v. Wainwright*, 617 F.2d 99, 104 (5th Cir. 1980), *cert. denied*, 449 U.S. 885, 101 S.Ct. 240, 66 L.Ed.2d 111 (1980); and *United States v. Dougherty*, 473 F.2d 1113, 1127-30 (D.C.Cir. 1972). The *Chapman* decision did leave room, however, for a finding of harmless error if the defendant was "afforded a genuine opportunity to help conduct his defense." 553 F.2d at 891 n.9.

cumstances, there is a need for a harmless error rule. Were there none, a reversal would be mandated every time overzealous counsel, acting in the best interests of his client, volunteered his aid without prior permission. This would be true even though the interjections were few and innocuous. Moreover, an automatic reversal rule would give unscrupulous counsel *carte blanche* to sandbag the prosecution. All that would be necessary to secure a new trial for a defendant whose conviction is a foregone conclusion would be for counsel to throw himself into the fray. Such results were not meant to be. Some flexibility is necessary, and the harmless error rule is the vehicle that takes us there.

Notwithstanding our adoption of such a rule for cases like the present one, the result below must still be reversed. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967). The burden is a heavy one, and it rests on the government. In order to make such a determination, an examination of the record as a whole is necessary; passages are to be examined in context, and evaluated in light of their affect on the total mix.[27]

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27. While interjections made in the presence of the jury are inherently prejudicial, and are therefore subject to strict scrutiny, statements made outside their presence are not to be discounted. Conceivably, a defendant could become so frustrated or flustered by standby counsel's interference as to be unable to regain his composure by the time the jury returned. Colloquies such as that set forth in note 10 *supra* would warrant further consideration. In addition, it is also important to note that trial strategy and the image defendant wishes to project to the jury are not the only reasons why a defendant may wish to proceed *pro se*. *See* note 16 supra.

A review of the record in the case at hand reveals that the government has failed its task of demonstrating that counsel's participation was harmless. As indicated earlier, counsel continuously objected, and on several occasions moved for mistrial, despite defendant's repeated requests that he play a more passive role. They were in constant disagreement over basic trial strategy, and at one point counsel cursed in front of the jury. We fail to perceive how such conduct could have anything but a negative impact on the jury. It also destroyed Wiggins' own perception that he was conducting *his* defense.

C.

One final point to address is the question of Wiggins' acquiescence. The government argues that more often than not, defendant approved standby counsel's participation or failed to register any protest when counsel acted in his behalf. Acquiescence, however, is not the only possible explanation for defendant's conduct. Early in the proceedings, the trial court let it be known that it was not going to order standby counsel not to participate.[28] More likely than not, Wiggins interpreted this statement to mean that continuous objections would be unproductive. Also to be considered is the fact that confrontation, in the presence of the jury, would only help to destroy the image defendant wished to convey to the jury.

All of the above, however, is speculation. Moreover, it is unnecessary in light of this opinion's definition of the role of standby counsel. Once the right of self-representation has been asserted there will be no question of acquiescence unless counsel's participation has been overt-

28. *see* note 8 *supra.*

ly encouraged by the defendant. Such action has not taken place here.[29]

REVERSED and REMANDED for the granting of the writ of habeas corpus and the entry of an appropriate judgment.

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29. Wiggins authored a brief statement which he requested his court-appointed attorney on appeal to read to this Court. In light of the fact that this opinion focuses on a defendant's right to proceed *pro se*, it is appropriate that it be included here:

> The Supreme Court, and this Court before the Supreme Court, determined that the defendant has a constitutional right to defend himself without counsel if and when he elects to do so. This solidly established. And the trial court may, even over the defendant's objection, appoint a standby counsel for consultation or advisement. This much is held by *Faretta*. Or in the event that the defendant's conduct becomes disruptive, to be available to take over the defense if that becomes necessary. But when standby counsel abandons his designated assignment, and proceeds to participate in the trial against the def ndant's wishes, and over his objection, just how much participation by unwanted counsel is to be allowed? Where does there exist any markers to limit active participation of an aggressive lawyer that a defendant on trial wants no part of at all? If such active, unwanted, and unsolicited participation of standby counsel as this case presents is approved by the Court, would not this then open the doors for future cases that would provide for trial judges to make subjective and possibly inequitable determinations from case to case allowing or not allowing designated standby counsel to participate in varying degrees even over the objections of *pro se* defendants? If this becomes practice, where would the counsel participation line be drawn? If this becomes practice, it could be not said [sic] that such a defendant would have standing to complain of the effectiveness or ineffectiveness of counsel actively participating in trial against his [the defendant's] will. If this became practice, eventually the constitutional right we're talking about would surely become meaningless.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARL EDWIN WIGGINS,	§	
Petitioner	§	
	§	
V.	§	NO. SA-79-Ca-128
	§	
W.J. ESTELLE, JR., Director	§	
Texas Department of	§	
Corrections, and	§	
MARK WHITE,	§	
Attorney General of Texas,	§	
Respondents	§	

ORDER

On this date came on to be considered the petition for writ of habeas corpus filed herein by Carl Edwin Wiggins, and the Court having examined the pleadings of the petitioner, and having examined the report of the United States Magistrate and his recommendation, together with any objections, is of the opinion and finds that the magistrate's report is in all things correct and should be approved and adopted. It is accordingly

ORDERED that the petition for writ of habeas corpus be, and the same is hereby, DENIED.

SIGNED and ENTERED this the 26th day of August, 1980.

/s/ Fred Shannon

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARL EDWIN WIGGINGS, *Petitioner*	§	
V.	§	NO. SA-79-CA-123
W.J. ESTELLE, JR., Director Texas Department of Corrections, and MARK WHITE, Attorney General of Texas, *Respondents*	§	

FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE

T O : Honorable Adrian A. Spears
United States District Judge

Petitioner, CARL EDWIN WIGGINS, has filed this application for writ of habeas corpus pursuant to 28 U.S.C. 2254, setting forth six separate points of alleged error in connection with his trial and conviction for robbery by assault in the 187th Judicial District Court of Bexar County, Texas, in Cause No. 73-CR-648. He further alleges two points of error in connection with his appeal from that conviction, which appeal resulted in conviction being affirmed. *Wiggins v. State*, 520 S.W.2d 780 (Tex. Crim. App. 1975). Petitioner's punishment was assessed at life imprisonment in the Texas Department of Corrections.

Before reaching the merits of petitioner's application for writ of habeas corpus, his motion to disregard respondent's answer must be determined. Petitioner originally filed his application for writ of habeas corpus in the Southern District of Texas, Houston Division, on

February 23, 1979. The petition was transferred to this Court on April 3, 1979. On June 1, 1979, the respondent filed his first motion for extension of time to answer, to which petitioner agreed, and an extension until July, 2, 1979, was ordered. Thereafter, on July 23, respondent filed his second motion for extension of time requesting an extension to July 26, which was granted. Petitioner in the meanwhile had filed his motion for judgment granting relief on July 25 and on July 30, filed a motion to vacate the order granting the extension of time. Finally, on July 26, an order was issued extending the time to answer until October 1, 1979. Petitioner has strenuously objected to all extensions other than the extension to July 2. He has further filed numerous motions requesting the Court to enter default against respondent and grant the relief requested in his petition. In support thereof he cites *U.S. ex rel. Mattox v. Scott*, 507 F.2d 919 (7th CSir. 1974). In that case the Court stated the proper remedy was not to grant release of a petitioner where the response was filed late, because to do so would put the burden of default on the community at large, but rather to refuse to consider the answer. *Id.* at 924. I believe that reasoning is sound. *Scott*, supra; See *Curtis v. Perini*, 301 F.Supp. 444, 445 (N.D. Ohio 1968), aff'd 413 F.2d 546 (6th Cir. 1969).

By way of a backdrop, petitioner was originally arrested on February 20, 1972, and an indictment (72-CR-777) was returned on April 19, 1972. On May 17, 1972, the indictment was discovered to be fatally defective and Wiggins was released. On June 7, 1972 he was reindicted (72-CR-1141) for the same offense and was arrested again on June 29, 1972. Wiggins was tried in January 1973, found guilty and punishment was set at life imprisonment. On March 23, 1973, it was discovered the second indictment was also fatally defective. The judgment and sentence were set aside and petitioner was granted a new trial. Five days later, on March 28, 1973, two new idictments (73-Cr-648 and 73-Cr-653) were

returned by the grand jury both alleging the same offense. On June 4, 1973, the State elected to try petitioner under 73-CR-648 and he was subsequently convicted.

Turning next to the merits of the petition, petitioner's first contention, that he was deprived of his right to present his own defense, is wholly without merit. Petitioner, on his own, made numerous pretrial motions, including motions for discovery (S/F 7) to set aside the indictment (S/F 8), special pleas (S/F 52), and preparation of jury list (S/F 60). He also exercised virtually exclusive management of the trial on the merits, leading direct examination of his own witnesses (S/F 348, 368, 381, 383, 384, 399, 403, 408) and cross examination of the State's witnesses (S/F 199, 269, 319, 332, 455, 532). Petitioner also stated he would like to consult with the attorneys for advice (S/F 40). Moreover, and notwithstanding petitioner's complaints, that appointed counsel, on his own initiative, repeatedly moved for a mistrial and otherwise interjected unwelcome objections, petitioner more often than not approved of counsel's actions (S/F 24, 26, 31-32, 82, 210-23, 235, 261, 284-86, 287-88, 301-304, 363, 421, 486, 517, 523-36, 541, 543). Indeed, any doubt that Wiggins was allowed to conduct his own defense was resolved when the Court refused appointed counsel an opportunity to question a witness because Wiggins objected to the questions being asked. (S/F 306-308) Lastly, the Court stated numerous times that Wiggins would be awarded singular control over the defense (S/F 4-5, 31-32, 3 08, 430). I find that the record as a whole establishes Wiggins was indeed allowed the right to conduct his own defense, and that the court-appointed attorneys were present in a standby, advisory capacity only. Appointment of counsel in that capacity was approved in *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525 (1974).

Any need to consider petitioner's second contention is obviated by my finding he was allowed to represent himself.

Wiggins next complains he was denied his sixth and fourteenth amendment right to compulsory process of two witnesses, Mr. Truman Beasley and Mr. Douglas Simmons. He states he filed subpoenas for Beasley and Simmons a month before trial but that the subpoenas were never processed.

Initially it is noted petitioner filed his application for subpoenas May 23, 1973, and trial on the merits began June 7, 1973. He made application for a subpoena to issue for Truman Beasley (Tr. 602-605), but failed to do so for Doug Simmons (S/F 272, 394). The Court instructed Wiggins to consult with his attorney to effect a subpoena on Simmons. There is nothing in the record to show petitioner ever did so. Nor did the petitioner ever show the materiality of Simmon's testimony other than "...he could be material, he could have seen the robbery, he could have given a description." (S/F 395). Wiggins also failed to insert into the record what Truman Beasley would have testified to. Finally, after calling Truman Beasley one last time, and there being no response, Wiggins, against the advice of counsel, rested (S/F 413-414). Petitioner, having made no attempt to show the relevance or materiality of the witnesses' testimony, or include what they would have testified to in the record, failed to comply with necessary State procedural requisites. *Brito v. State*, 459 S.W.2d 834 (Tex. Crim. App. 1970). That being the case, he cannot now urge denial of compulsory process without first showing both some cause for his default and prejudice resulting therefrom. *Buckelew v. United States*, 575 F.2d 515 (5th Cir.); *Hoskins v. Wainwright*, 440 F.2d 69, 71 (5th Cir. 1971); See, *Hardin v. Estelle*, 484 F.2d 944 (5th Cir. 1973). Petitioner has demonstrated neither cause nor prejudice.

Petitioner's next ground is that he was denied his right to a speedy trial. In support of this contention he states he was arrested on February 20, 1972, but not tried in Cause No. 73-CR-648 until June 4, 1973, i.e., a delay of approximately fifteen and one-half months. While it is true petitioner's *final* conviction (in Cause No. 73-CR-648) was not until June, 1973, the record reflects petitioner was initially indicted for this crime in Cause No. 72-777, dated April 19, 1972. That indictment was quashed on May 17, 1972. Wiggins was subsequently reindicted on the same charge, brought to trial, and convicted. The judgment of conviction and sentence were set aside due to an insufficiency in the indictment. Finally, on June 8, 1973, he was convicted and sentenced to life imprisonment. The leading decision on the right to a speedy trial is *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). In that case the Supreme Court held that a defendant's constitutional right to a speedy trial could be determined only on an *ad hoc* basis, balancing the conduct of the prosecution as well as that of the defendant. It further pointed out that factors such as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant should be considered. 407 U.S. at 530. *Torres v. Florida*, 477 F.2d 555 (5th Cir. 1973); *U.S. v. Zane*, 489 F.2d 269 (5th Cir. 1973). However, that test was held not to apply to cases dealing with pre-indictment delay absent a showing of actual prejudice. *United States v. Smith*, 487 F.2d 175, 177 (5th Cir. 1973). The indictment under which Wiggins was finally convicted (Cause No. 73-Cr-648) was returned on March 28, 1973, approximately five days after judgment was set aside under the previous indictment, and his trial under 73-CR-648 began on June 8, 1973 less than three months later. Of course a showing of actual prejudice by petitioner would nevertheless mandate granting relief. Actual prejudice has been defined as "...that prejudice resulting from a delay that has so impaired the defendant's capacity to prepare a defense as

to amount to an infringement on his right to a speedy trial." *United States v. Smith*, supra. Having fully examined the lengthy pleadings and record, I am of the opinion Wiggins has presented only the most tenuous claims of prejudice. That being the case, that is, no actual prejudice having been shown, this ground is without merit.

Petitioner next contends he was denied due process and equal protection of the law because of "multiple prosecutions not in accord with state law." In support of this contention Wiggins argues the trial court was without authority to set aside petitioner's conviction in Cause No. 73-1141, there were no legal provisions for a new trial under the circumstances, and his second trial (73-CR-643) constituted double jeopardy. First, the record shows the trial court set aside petitioner's conviction and sentence in Cause No. 72-1141 as a result of a meritorious motion by the defense to grant a new trial and dismiss Cause No. 72-1141. (Supp. Tr. No. 73-CR-648, in Cause No. 72-1141). The ground for the motion was that the indictment was fatally defective in that it failed to allege ownership. In view of the fact the indictment was fatally defective no jeopardy attached. *Ward v. State*, 520 S.W.2d 395, 397-98 (Tex.Crim.App. 1975). Therefore, a second trial of petitioner on the same charge under a subsequent valid indictment was proper. *Ward*, supra; See, *U.S. v. Jasso*, 442 F.2d 1054, 1056 (5th Cir. 1971), *cert. denied* 404 U.S. 845 (1971).

Wiggins penultimate allegation is that he was denied a full and adequate record for appeal. In support of this he alleges he specifically requested transcriptions of hearings in the 187th Judicial District Court dated December 7, 1972, and January 11, 1973, which hearings related to "adverse services" by his appointed attorneys in Cause No. 72-1141. Petitioner's conviction and sentence in Cause No. 72-1141 having been set aside on his own motion, any alleged "adverse services" by

defense counsel in that trial were thereby corrected. Therefore, failure to include in the record on appeal in Cause No. 73-CR-648 transcriptions of hearings relating to Cause No. 72-1141 was at most harmless error. See, *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). Moreover, petitioner is entitled only to a "record of sufficient completeness" to permit full and proper consideration of his claim *Draper v. Washington*, 373 U.S. 487, 499, 83 S.Ct. 774, 781 (1963). There is no allegation that peitioner did not have such a record in Cause No. 73-CR-648.

Finally, Wiggins claims he was denied the right to prosecute his appeal without state appointed lawyers. Initially it is noted that Wiggins, on November 20, 1973, requested counsel to be appointed to represent him on appeal (Tr. 800). Secondly, petitioner in spite of the fact counsel was appointed and filed an appellate brief, was allowed to file one himself. Petitioner's brief cited twenty-one grounds of error and is 150 pages long. Furthermore, if there was any question whether petitioner had his say on appeal it was resolved in the opinon of the Court of Criminal Appeals, when the Court stated, "(w)e have reviewed appellant's pro se brief and find that contentions urged therein are totally without merit or have been asserted in the brief filed by his court-appointed counsel on appeal." *Wiggins v. State*, 520 S.W.2d 780, 782 (Tex.Crim.App.1975).

RECOMMENDATIONS

(1) Respondents' answer and motion to dismiss should not be considered in reaching a determination on petitioner's application for writ of habeas corpus.

(2) Petitioner's application for writ of habeas corpus should be DENIED.

The Clerk shall serve a copy hereof upon all parties by mailing such copy by Certified Mail, Return Receipt Requested, to all attorneys of record and to Petitioner. Any party may serve and file written objections to such findings and recommendations within ten (10) days after being served.

SIGNED this 18th day of December, 1979.

/s/ Robert B. O'Connor

ROBERT B. O'CONNOR
United States Magistrate

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